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No. 636

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 26–31) is reported in 131 F. (2d) 614.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 2, 1942 (R. 25–26). Petition for a writ of certiorari was filed on January 7, 1943, and was granted February 15, 1943 (R. 31). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act of June 30, 1938, 52 Stat. 1250 (15 U. S. C., section 902 (f) in pertinent part [1] provides as follows:

> Section 2 (f):
>
> It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was * * * received, * * * by such person in violation of this Act.

STATEMENT

On January 22, 1942, the respondent, Frank Delia, was convicted by a jury in the United States District Court for the Eastern District of

[1] The Act is set out in full in the Appendix, *infra*, p. 50 *et seq.*

Michigan upon a two-count indictment alleging violations of Section 2 (f) of the Federal Firearms Act (R. 1, 4–5). The first count (R. 4–5) alleged that on September 25, 1941, Delia "was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed"[2] and that he did "receive and possess a firearm, to wit: one Victor 38-caliber double action No. 19435, revolver, which firearm had theretofore been shipped and transported in interstate commerce" (R. 5). The second count repeated the allegation of the previous conviction and alleged further that Delia, again on September 25, 1941, did "receive and possess two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce" (R. 5). The court on January 23, 1942, sentenced Delia to five years' imprisonment on both counts, the sentences to run consecutively (R. 1).

The evidence, which appears in the record largely as an agreed statement of facts (R. 6–7), may be summarized as follows:

On October 4, 1930, Delia had been convicted of armed robbery in the Recorders Court of Detroit, Michigan (R. 6). There was testimony that on September 25, 1941, in Detroit, Delia had a loaded revolver in his possession (R. 7). The

[2]Armed robbery is a "crime of violence" under the definition of Section 1 (6) of the Act.

revolver had been manufactured in Massachusetts some time before 1920, apparently between 1900 and 1920 (R. 9, 12). Some of the cartridges had been manufactured in Ohio and some in Germany (R. 10, 11). The Ohio cartridges had been manufactured some time after 1934, but the date of the manufacture of the German cartridges was not stated (R. 13). The Government introduced no testimony, however, that Delia knew that the gun or the cartridges had been received, shipped, or transported in interstate or foreign commerce or that he actually received, shipped, or transported the gun or the cartridges in interstate or foreign commerce (R. 7).

Delia testified that he picked up the gun in self-defense after it had been dropped by one of several persons who had attacked him, and that he had not seen the gun or possessed it before (R. 7). The witnesses who had testified to Delia's possession also testified that they "did not see any scuffle nor did they see the revolver dropped by anyone and picked up by Delia as he claimed" (R. 7).

The circuit court of appeals reversed the conviction on both counts (R. 25–26), on the ground that the presumption of section 2 (f) is unreasonable, arbitrary, and capricious, and therefore violative of the due process clause of the Fifth Amendment, in that there was no "rational connection" between the fact which must be proved to make the

presumption operative and the ultimate fact inferable by virtue of the presumption.[3]

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional.

SUMMARY OF ARGUMENT

The court below correctly construed this subsection of the Act as carrying a substantive liability only for receipt which is the termination of interstate transit of the gun or ammunition, but erred in holding unreasonable the presumption that the receipt was interstate and after the effective date of the Act.

A. Local law makes it difficult for a person with a violent-crime record to acquire a gun intrastate, by forbidding him to acquire a gun in the state and penalizing any intrastate transferor; and in the congressional hearings leading to this Act there was informed testimony that the effect of local law was to compel acquisition to take place interstate. Hence,

[3] The court below also reversed, on the same grounds, the conviction in a companion case, *United States* v. *William Minski*, No. 637, in which the Government's petition for certiorari is now pending. The same issue is presented in *Frank Tot* v. *United States*, No. 569, to be argued at the same time as the instant case; and it is also raised in *Jose Casex Velasquez* v. *United States*, No. 713, in which the defendant's petition for certiorari is now pending.

Congress had adequate ground for deeming it likely that acquisitions in such cases take place interstate, and its action in crystallizing that likelihood into a presumption is not unreasonable. *Mobile, etc. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, particularly in view of the fact that the transactions are in violation of local policy and that the actual facts regarding them are known only to the defendant. *Yee Hem* v. *United States*, 268 U. S. 178; *Casey* v. *United States*, 276 U. S. 413.

Since there was testimony before Congress, confirmed from other sources, that persons with violent-crime records are particularly likely to move interstate to commit crimes elsewhere than in their states of residence, Congress had power to enact a prohibition of even intrastate acts reasonably deemed preparatory to dangerous interstate movement, as action on behalf of states other than that of acquisition. *United States* v. *Darby*, 312 U. S. 100, 118. Hence even if the particular inference embodied in the presumption be regarded as in itself improbable, it is valid as a prohibition plus an exemption for those who could prove that they acquired intrastate, and the policy of granting such an exemption is not a matter for judicial review. *Ferry* v. *Ramsey*, 277 U. S. 88.

B. Although there is no probability of acquisition subsequent to the effective date rather than prior to it, at least on the facts of the instant case,

the defendant best knows the date of acquisition, and can validly be required to come forward with evidence on the point, as a regulation of the order of proof ancillary to the valid main presumption of manner of acquisition. Requiring the production of evidence of the exemption of an activity otherwise indistinguishable from activity subject to the statute is a sanctioned method of meeting the recognized need for drafting a workable statute. *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192; *United States* v. *Darby*, 312 U. S. 100, 118, 125.

C. The presumption herein cannot be said to deprive defendant of a fair trial and thus to violate the due process clause, because it has the same effect as the presumption of constitutionality would have if the substantive provisions of the statute penalized possession instead of interstate receipt. If the statute were so framed, the defendant would have the burden of proving that he had acquired his gun in an intrastate transaction (*Williams* v. *Walsh*, 222 U. S. 415; *Hatch* v. *Reardon*, 204 U. S. 152; *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *United States* v. *Miller*, 307 U. S. 174, 178) before he could complain of any invalidity in the statute. If the time of his acquisition was relevant to his attack, he would be required to prove it as well. *Stockholders* v. *Sterling*, 300 U. S. 175, 184.

ARGUMENT

THE PRESUMPTION OF SECTION 2 (F) OF THE FEDERAL FIREARMS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The court below, in invalidating the presumption of section 2 (f) of the Act, held it unreasonable as failing to meet the test of "logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact" (R. 30) in two respects: first, that "common knowledge or experience does not teach that the class of persons with which we are here dealing usually procures firearms through the channels of interstate commerce"; second, that as illustrated by the gun in the case, upwards of twenty years old at the effective date of the Act and found on defendant only three years after the effective date, it was similarly arbitrary to presume acquisition by the defendant subsequent to rather than prior to the effective date of the Act (R. 30). We shall treat each of these grounds of decision separately, for in our view the considerations governing them are not entirely the same.

Introductory—Construction of the Subsection.—Section 2 (f) forbids a person who has a violent crime record to receive a gun or ammunition "which has been shipped or transported in inter-

state or foreign commerce."[4] This phrasing suggests two alternative possible meanings: (1) it prohibits receipt of a gun or ammunition at the termination of a shipment in interstate or foreign commerce; or (2) it prohibits receipt of any gun or ammunition which at any time in its prior career had moved in interstate[5] commerce. The court below, in concluding that the presumption was invalid for asserted want of sufficient inherent probability to warrant the inference that the possessor acquired the gun or ammunition in interstate commerce after the effective date of the statute, necessarily construed the statute as imposing substantive criminal liability only for receipt which is the termination of an interstate transit. This construction precludes the second construction, which would impose liability for an intrastate acquisition after an *independent* interstate transit. If the second and broader construction is proper, liability is imposed for intrastate as well as interstate acquisition of an object which

[4] Cf. the other receipt crimes of the statute, Appendix, *infra*, p. 3. Section 2 (b) makes it unlawful to "receive any firearm or ammunition transported or shipped" interstate under the conditions stated therein; section 2 (b) makes it unlawful to "receive * * * any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen" under the stated conditions; section 2 (i) makes it unlawful to "transport, ship, or knowingly receive" interstate under the stated conditions.

[5] Here and hereafter "interstate" is used to include "foreign" where the context does not forbid.

has at one time been in interstate movement, quite apart from the acquiror's participation in or perhaps even his knowledge of the prior interstate career of the object, and perhaps even quite apart from the date when it entered the state. On that basis much of the due process difficulty found by the court below would disappear, for it would not be necessary to presume interstate acquisition where, as here (R. 9–11), there was actual proof of extrastate origin and hence of sometime interstate travel of both gun and ammunition. This treatment of the statute would thus shift the constitutional problem from the validity of the presumption of interstate commerce as a matter of due process to the validity of the substantive liability as an exercise of the commerce power after the transit had ceased. The question would be that reserved in *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 53, whether Congress has power to impose personal liability with respect to "contraband of commerce" after the commerce is over. Compare *McDermott* v. *Wisconsin*, 228 U. S. 115, *Brolan* v. *United States*, 236 U. S. 216, and *Brooks* v. *United States*, 267 U. S. 432, 439, with *Keller* v. *United States*, 213 U. S. 138, and *Schechter Corp.* v. *United States*, 295 U. S. 495.

In our view, however, the narrow substantive construction adopted by the court below was proper, and that court erred only in invalidating the presumption under the statute so construed. The same substantive construction, moreover, was

adopted in the trial court, which received defendant Delia's evidence of intrastate acquisition and made it the turning point of the charge to the jury, according to it the status of a complete defense (R. 18, 20–21, 22). There was no exception to this charge, or any request for further charge. Since the trial court thus treated the defense testimony of intrastate acquisition, more than three years after the statute became effective and without participation in or even knowledge of any interstate transaction, as the turning point of the case, defendant was convicted in the trial court on the same construction of the subsection adopted by the court below and urged herein. Accordingly, the constitutional problems arising out of the broader construction need not be considered. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145; *United States* v. *Walter*, 263 U. S. 15, 17–18; *United States* v. *Wurzbach*, 280 U. S. 396, 399; see also *Williams* v. *Walsh*, 222 U. S. 415, 421; *Dillingham* v. *McLaughlin*, 264 U. S. 370, 374; *Hart* v. *Virginia*, 298 U. S. 34, 35; *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 15, 17–18; cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

The propriety of the narrow construction appears from considerations both on the face of the statute[*] and in its legislative history. The word

[*] The pertinent portion of the statute provides: "It shall be unlawful * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce * * *."

"receive" alone suggests the consummation of a transaction which prior thereto was incomplete.[7] "Acquire," "obtain," or indeed simply "possess," would have been more appropriate substantive words to designate the forbidden act if it had been meant to be independent of the prior shipment or transportation.

The development of the statute in Congress points in the same direction. The original bill, S. 885 of the 73rd Congress, was subjected to a series of revisions and reintroductions as S. 2258 and S. 3795 in that Congress, and S. 3 in the 74th and 75th Congresses, under the constant sponsorship of the Senate "Special Committee on Crime."[8] The instant section 2 (f) first appears

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[7] Cf. the explanation of Section 2 (f) before the House Committee: "Subdivision (f) provides that a person who has been convicted of a crime of violence or who is a fugitive from justice may not *receive a shipment* of a gun." Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (S. 3), p. 9 (italics supplied). The witness, Major Gen. Milton A. Reckord, had been one of the draftsmen of the statute. Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3) pp. 1, 43. His testimony is an appropriate source from which to ascertain the Congressional purpose. *Securities and Exchange Comm.* v. *Robert Collier & Co.*, 76 F. (2d) 939 (C. C. A. 2); *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 538, 547.

[8] S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 32–33. This committee, also known as the "Committee on Racketeering" or "Committee on Crime and Criminal Practice," was a subcommittee of the Senate Committee on Commerce, consisting of Senators Copeland, Murphy, and Van-

in S. 3795. That there was no intention to have it penalize a receipt independent of an interstate transaction appears from the fact that at the same stage a related section, cast in similar language, was otherwise modified to avoid exactly that construction for constitutional reasons. The predecessor draft, S. 2258, had contained a section 2 (b), along the general lines of the present section 2 (b), relating to acquisition of guns shipped into the state in violation of the licensing provisions of Section 2 (a). The then language, however, was in broad terms,[2] patently borrowed from section 4 of the National Motor Vehicle Theft Act, 41 Stat. 324, 18 U. S. C., section 408; see also National Stolen Property Act, Sec. 4, 48 Stat. 795,

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denberg, acting in pursuance of S. Res. 74 and 196, 73rd Cong., and S. Res. 306, 74th Cong. The committee had held extensive hearings on the crime problem in general, Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. Res. 74), as well as specific hearings on firearms bills. Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2nd Sess. (S. 885, S. 2258, S. 3680); and had acted as Senate sponsor for the numerous statutes comprising Attorney General Cummings' crime control program. S. Rep. No. 1440, 73rd Cong., 1st Sess., *passim;* S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 1–5, 40–52.

[2] "It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm shipped in interstate or foreign commerce" by an unlicensed person, knowing the firearm to have been so shipped. The text of this draft is set out in Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. 885, S. 2258, S. 3680), p. 1.

18 U. S. C. section 416. A witness pointed out to the committee that section 2 (b) in that form raised constitutional doubt, "because it seems to me that it undertakes to exercise Federal control over articles of merchandise, long after they have in fact ceased to be a part of interstate commerce." Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. 885, S. 2258, S. 3680), pp. 91–92. The point was of course a restatement of the treatment accorded section 4 of the National Motor Vehicle Theft Act in *Brooks* v. *United States*, 267 U. S. 432, 439, where this Court sustained the broad language of storing and concealing only because of its restriction to matter "moving as, or which is a part of, or which constitutes interstate or foreign commerce."

In accordance with the witness' suggestion, the committee thereupon revised section 2 (b) into substantially its present form, with acts other than receipt deleted. The other acts mentioned in the old section 2 (b) appeared in the new bill (and ultimately in the statute) only in a new section 2 (h), which borrowed the rest of the pattern of the National Motor Vehicle Theft Act by making it unlawful to "receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition *moving in or which is a part of* interstate or foreign commerce, and which while so moving or constituting such part has been

stolen, knowing, or having reasonable cause to believe the same to have been stolen." [Italics supplied.] It was in this very revision that section 2 (f), making it unlawful for a person of the class designated to "receive a firearm which has been shipped or transported" etc., was first added, indeed as an adoption of another suggestion of the same witness who had made the point of constitutional law as to section 2 (b).[10] It seems clearly untenable to assume that the committee, having narrowed the scope of section 2 (b) for no other reason than to avoid constitutional question under the commerce clause, enacted the new section 2 (f) either in ignorance of the judgment of constitutional law which it had just made as to the old section 2 (b) or with the deliberate intent to fly

[10] The germinal idea of section 2 (f) was advanced before the Special Committee as a proposed substitute for certain of the provisions of S. 3680 and H. R. 9066, 73rd Cong., the bills which in revised form (H. R. 9741, 73rd Cong.) became the National Firearms Act of 1934, 48 Stat. 1236, Internal Revenue Code Secs. 2720–2733, 3260–3263. The bills, as introduced, had defined "firearm" to include pistols and revolvers. S. 3680 and H. R. 9066, 73rd Cong. Representatives of sportsmen's organizations and of the Commissioners on Uniform Laws had raised objection to the registration provisions and the cumbersome machinery of transfer, Secs. 4, 5, Internal Revenue Code Secs. 2723, 3261, as an unwarranted burden on the ordinary law-abiding citizen. In view of these objections, the 1934 Act, as enacted, was restricted to machine guns, sawed-off shotguns and silencers, sec. 1 (a), Internal Revenue Code Sec. 2733 (a). S. Rep. No. 1444, 73rd Cong., 2d Sess., p. 2; H. Rep. No. 1780, 73rd Cong., 2d Sess., p. 2; Hearings, H.

in the face of that judgment. See *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 123–125.

While the bare language of the statute might be construed to include an acquisition unconnected with the past interstate transaction, we feel certain in view of this legislative history that in a case which squarely raised the question by indisputable evidence that the defendant acquired the gun in a purely intrastate transaction, e. g., by open purchase from a dealer's stock, the Government would not be in a position to urge that the ambiguity be resolved against the defendant

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Committee on Ways and Means, 73rd Cong., 2d Sess. (H. R. 9066), pp. 43–44, 58–59, 62, 113, 129, 143; Hearings, Subcommittee of S. Committee on Commerce, 73d Cong., 2d Sess. (S. 885, S. 2258, S. 3680), pp. 24, 31, 56, 88; Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3), p. 21. As an alternative to take care of pistols and revolvers (and indeed all guns) in the hands of criminals while letting law-abiding persons alone, the sportsmen's representatives submitted to the Special Committee drafts of a provision using the commerce clause plus presumptions of commerce, to operate only on transients with violent-crime records and on fugitives, the approach of the present section 2 (f). Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d. Sess. (S. 885, S. 2258, S. 3680), pp. 20, 59, 94–96; see also Hearings, H. Committee on Ways and Means, 73rd Cong., 2d Sess. (H. R. 9066), pp. 61, 128. The Special Committee adopted the suggestion, expanded it to drop out the restriction to transients, and embodied it as section 2 (f) of its own bills. S. Rep. No. 1189, 75th Cong., 1st Sess., p. 33; Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3), p. 1; Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (S. 3), pp. 3–4.

by taking away from him the substantive defense of intrastate acquisition. We therefore construe the statute narrowly as did the court below, as making available the substantive defense, thus facing the constitutional question passed on by the court below.

A. THE PRESUMPTION OF INTERSTATE COMMERCE

The most frequently applied test of the validity of a statutory presumption under the due-process clause is that of a "rational connection" between facts proved and facts presumed, *Mobile, etc. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43. To meet this test, the relationship between the two types of facts need not be so close and direct as that which must obtain to take an ordinary circumstantial evidence case to the jury, for if that were true no presumption at all would be needed. Cf. *Bailey* v. *Alabama*, 219 U. S. 219, 235. For procedural purposes in relieving the proponent of the burden of supplying proof until the opponent has come forward with disproof, it is recognized that presumptions properly have "artificial" value in excess of the inherent probative force of the inferences they embody. *Yee Hem* v. *United States*, 268 U. S. 178, 185. Accordingly, the rational connection requirement, in the terms of the *Turnipseed* case itself, is merely "that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate," 219 U. S. 35, 43; or that the proved facts have at

least a "sinister" significance in the direction of the presumed fact. *Morrison* v. *California*, 291 U. S. 82, 90.

An alternative and often closely related test of the validity of a presumption emphasizes its rebuttability, treats it as a mere regulation of the order of proof, and determines its validity by the relative accessibility of proof to the prosecution and the defense. Under this test, a presumption is valid which seeks to have the opponent come forward with facts accessible to him but not to the proponent, while if the facts are not accessible to the opponent their unaccessibility to the proponent will not validate the presumption. *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Casey* v. *United States*, 276 U. S. 413, 418; *Morrison* v. *California*, 291 U. S. 82, 91. A presumption which passes this test may be valid notwithstanding its failure to meet the "rational connection" test. *Morrison* v. *California*, 288 U. S. 591; *Morrison* v. *California*, 291 U. S. 82, 88, 91.

The court below apparently gave no consideration to the possibility that the presumption herein was supportable under the second test, and held the presumption invalid solely because in the court's opinion it failed to satisfy the standards of the first test. The court erred, we submit, in each respect, for the presumption may be sustained under either test.

First.—The presumption is valid under the "rational connection" test because of two conditions

overlooked by the court below. The first of these conditions arises from the fact that the bulk of the small-arms industry of this country is centralized in the New England states,[11] so that to be found in defendant's hands in Michigan any gun or ammunition probably traveled across the state line if it were of domestic make and of course must have so traveled if it were of foreign make.[12] Second, there is a practical difficulty of intrastate acquisition of guns by men like defendant. Michigan, like some thirty other states, has firearms control laws.[13] Not only would defendant have violated Michigan law by acquiring his gun intrastate, but any intrastate transferor would have violated it by placing the gun in defendant's

[11] Department of Commerce, Bureau of the Census, *Biennial Census of Manufacturers* (1937), pt. 1, p. 926. The single Michigan manufacturer listed was not a manufacturer of revolvers or pistols. (R. 12.) For ammunition, *ib.* 628, showing one Michigan manufacturer, but Connecticut the most important state in the industry.

[12] This probability is illustrated by this and its companion cases, for there was direct and detailed testimony of extrastate origin in three (R. 9–11; No. 636, R. 12; No. 569, R. 37), and equally although less detailed testimony in the fourth (No. 713, R. 22).

Of course this factor would not be present if the defendant were in one of the manufacturing New England states, but Delia cannot raise this objection. *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

[13] The state laws vary too widely in detail for accurate tabulation. Provisions are collected in Warner, *The Uniform Pistol Act* (1938), 29 Journ. Crim. L. and Criminology, 529. Legislation restricting intrastate acquisition by per-

hands, for no one may acquire a pistol within the state without a license, no license may be issued to a person like defendant who has been convicted of armed robbery, and the transferor is required, subject to criminal penalty, to take up the license from the transferee and turn it over to law enforcement authorities.[19] The state penalty imposed on the transferor is a distinct obstacle to the local acquisition of a gun by a person like defendant. *Thus the local laws at the very least give* rise to some degree of probability that the acquisi-

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sons with violent-crime records is of three general types: (1) forbidding such persons to possess, and facilitating discovery of their possession by requiring transferors (usually dealers but sometimes private persons as well) to keep records of transfers open to law-enforcement authorities or to report each transfer; (2) licensing possessors (of concealed weapons) and acquirors (even if not to be concealed), forbidding unlicensed possession or acquisition, forbidding issue of license to persons of the class in question, and forbidding transfer to them without license; (3) forbidding transfer to them if their criminal record is known to the transferor. Detailed citations for Michigan and New Jersey, the states involved in this and the *Tot* case, appear in the next footnote.

[19] Mich. Stat. Ann. Sec. 28.92. The provisions date back to 1927, prior to Delia's 1930 (R. 6) conviction, and also prior to July 30, 1938, the effective date of the instant statute, Section 9. The Michigan statute is in terms of "sale" of "pistols" to persons convicted of "felony," but "seller" includes a person transferring by gift or loan as well as sale, and "pistol" includes any weapon of barrel length of 30 inches or less. Mich. Stat. Ann. Sec. 28.91. Armed robbery, the crime appearing on Delia's record (R. 6), is a felony under Michigan law. *Ib.*, Secs. 28.196, 28.797. In addition, Michigan has had since 1925 a requirement of

tion of firearms by men like defendant is not an intrastate transaction within the reach of the local law. Clearly, absolute probability is not necessary to support the presumption under the "rational connection" test, else the inference would follow naturally and no statute would be needed to create it. *Bailey* v. *Alabama*, 219 U. S. 219, 235.

Moreover, this Court has treated such local prohibitions as indicating a factual pattern of normal compliance sufficient to justify Congress in raising a presumption of importation which imposes upon a possessor the burden of coming forward with facts within his knowledge, to explain his deviation from the local pattern: in *Yee Hem*

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registration of guns possessed, first by way of a direct registration statute, Mich. Pub. Acts 1925, No. 313, Sec. 11 (Acts, 1925, p. 476), and under the 1927 law by provisions for "safety inspection" which set up a system of permanent official record of the description of the possessor and the gun. Mich. Stat. Ann. Sec. 28.97. Dealers are required to keep records of sales. Mich. Stat. Ann. Sec. 28.429.

Petitioner Tot, in No. 569, is in a somewhat similar position under New Jersey law, because of this convictions for assault and for breaking and entering at night (No. 569: R. 14-15, Gov't. Exh. 5 original). Since 1927 intrastate acquisition without license is forbidden, no license may be issued to a person with Tot's record, and no one may sell without presentation of the license and notification to the law enforcement authorities. N. J. R. S. (1937), secs. 2:176-2, 5, 8, 24, 33, 35, 44. Gift does not appear to be forbidden, nor unlicensed acquisition prior to 1927, but since 1912 any intrastate transferor has been required to notify law enforcement authorities. *Ib.*, sec. 2:176-4.

v. *United States, supra,* sustaining the rebuttable presumption of unlawful importation of smoking opium, arising from possession, the Court said:

> By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress. 268 U. S. 178, 184.[12]

See also *Casey* v. *United States,* 276 U. S. 413, 418, sustaining the presumption of the Harrison Act that narcotics possessed were purchased un-

[12] The statute involved was expanded by subsequent amendment, Act of May 26, 1922, to its present form, 21 U. S. C. Sec. 174, applying to all "narcotic drugs," and has been uniformly so sustained notwithstanding the contention of greater probability of unimported possession of narcotics other than smoking opium, since some of them are manufactured in this country. Cases are collected in *Bugler* v. *United States,* 86 F. (2d) 41, 42 (C. C. A. 7), certiorari denied, 300 U. S. 677.

stamped because it dealt "with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by violation of law." If defendant acquired his gun in Michigan in accordance with the state laws just outlined, the Michigan license record of the transaction would almost certainly be available as a public record "easily proved," to remove him from the peril of the federal statute.[16]

When Congress was considering this and related subsections,[17] evidence was before it that interstate acquisition of guns was common and had resulted in a partial breakdown of the effectiveness of state gun laws. The Senate's "Special Committee on Crime," sponsor of the statute,[18] had had before it the testimony of the Police Commissioner of New York City concerning interstate evasion of New York State's famous Sullivan law,[19] to the

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[16] Such use of the federal power to supplement state legislation by acting directly to prevent interstate evasion is familiar under the commerce clause. *United States* v. *Darby*, 312 U. S. 100, 115; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 348-349; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323.

See also the comment by the Commissioners on Uniform Laws, 9 Uniforms Laws, Anno. (1942 ed.) 586, on the effect of the instant Act as an encouragement of similar local legislation in states which now lack it.

[17] Subsection (e) of section 2 prohibits similar interstate shipment or transportation of guns.

[18] See note 8, *supra*.

[19] N. Y. Penal Law, sec. 1914.

effect that one-fourth of the guns confiscated by his officers during a two-year period had been "bootlegged into" the state. (Hearings, Subcommittee of S. Committee on Commerce, 73rd Congress, 2nd Session (S. Res. 74), p. 9.) To the same effect, the committee heard the testimony of a captain of the New York State Police, recommending legislation on the interstate transportation of guns, because he thought the Sullivan Law "a washout." (*Ib.* 58.)[29] There was similar testimony by the Chief of Police of Detroit, Michigan, on the practical effect of the local laws of Michigan, the state of Delia's possession, as diverting to other states the bulk of the acquisitions by persons ineligible under Michigan law, notwithstanding sporadic violation of the Michigan law. His figures showed over 16 per cent of the guns confiscated over a four-year period were foreign-made (*Ib.* 210–211), and on inquiry on how they got into the state he testified:

> They have been brought in here in some manner, and I do not think that State legislation in any manner is going to stop the carrying of guns. There may be * * *

[29] See also the statement by another New York City Police Commissioner, of a practice involving "hundreds of guns annually," whereby New York resident purchasers evaded the Sullivan Law by claiming to be nonresidents, instructing the New York dealers to deliver to an address in an adjoining state, picking the gun up in that state and returning to New York. *New York Times*, May 5, 1935, p. E–11.

> a Federal statute that would govern bringing across from one State to another any gun. It might help considerably * * *. They were mail-order guns until the law was passed stopping the mailing of them.[21] They come in, I think, to legitimate dealers in towns where they are allowed to sell them. We have them here in our gun salesrooms. *They are sold, I think, very little here because of our State law, but certainly in some cases they are sold without permits.* But there are States very close to our border lines that have no law at all governing guns.[22] *Ib.* 211. [Italics supplied.]

When dealing with most presumptions, judicial or statutory, the courts have had no better guide than "common knowledge or experience" (R. 30) to inform them whether the proved facts have the requisite "sinister significance" (*Morrison* v. *California*, 291 U. S. 82, 92) in the direction of those presumed. In no case in which a statutory presumption has been invalidated in this Court as running beyond common knowledge or experience, however, has there been involved a showing, such as is presented by the instant legislative record, that a specialized expert knowledge of the probabilities in the field has actually been brought

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[21] The reference is apparently to the Act of February 8, 1927, 44 Stat. 1059, 18 U. S. C. 361.

[22] See also the testimony, R. 13–14, on the operation of the Michigan statute, and the Michigan practice of purchasing guns in Ohio "like you would buy popcorn here."

to the attention of the legislative body. Here there is no justification for holding, as did the court below, that "common knowledge or experience" controls the issue. Appraisal by qualified experts having confirmed before Congress the probability of interstate acquisition implicit in the existence of the state laws on the statute books, the congressional judgment, that it is proper to raise against a man with a criminal record sufficient to make unlawful an intrastate transfer to him a rebuttable presumption of acquisition elsewhere, cannot be dismissed as arbitrary. *United States v. Carolene Products Co.*, 304 U. S. 144; *Stafford v. Wallace*, 258 U. S. 495, 521; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 37.

Second.—The presumption also may be sustained under the second test, that making opportunity of knowledge and access to the proof the determining factors. There is such a "manifest disparity" (*Morrison v. California*, 291 U. S. 82, 91) between the opportunity for knowledge of the prosecution and that of the defendant that little need be said about it. Better than anyone else the defendant knows where and when he acquired his gun and ammunition. Thus the availability of this test as support for the presumption turns on the relative positions of the prosecution and defendant respecting accessibility to proof.

The superior opportunity for knowledge of the defendant gives him a readier access to the proof,

because it immediately solves for him the initial problem of where and from whom he acquired the gun and ammunition. If the prosecution were required to prove this fact, it is difficult to see how, in the normal case, the prosecution could avoid having to interrogate every gun seller in the entire United States until the right one was found. The local dealers and police would not have a record of the sale in any case except one where the purchase was intrastate, *i. e.*, where the defendant was innocent. The defendant, on the other hand, who knows where he acquired the gun and ammunition, has the power to subpoena the seller and his records, who will be compelled to testify even if the sale was in violation of the laws of the state where made.[23] Furthermore, the defendant has a better knowledge than the prosecution of those among his friends and associates who can testify to the period of his possession and similar facts casting light on the time and place of acquisition.

It is true, of course, that if the defendant himself takes the stand[24] to give testimony to rebut the presumption, the jury may discount his testimony because of his prior criminal record. This

[23] The privilege against self-incrimination in federal courts does not extend to state crimes. *United States* v. *Murdock*, 284 U. S. 141, 149.

[24] The statute is not subject to objection under the Fifth Amendment because of any tendency to compel the defendant to take the stand. *Yee Hem* v. *United States*, 268 U. S. 178, 185.

cannot affect the issue, however, since to do so would be to write exemptions for recidivists into the possession presumption of the smuggling statute (46 Stat. 751, 19 U. S. C. Sec. 1593), and of the Harrison Act (38 Stat. 785, I. R. C. Sec. 3224; 40 Stat. 1130, I. R. C. 2553), and of the National Firearms Act of 1934 (48 Stat. 1236, I. R. C. Sec. 3261 (e)), and even into the common-law possession presumption in theft and homicide cases (*Wilson* v. *United States*, 162 U. S. 613, 619–621). As Judge Goodrich stated in the companion *Tot* case: "That the trier of the fact will not believe one's story is a risk common to all litigants." *United States* v. *Tot*, 131 F. (2d) 261, 271 (C. C. A. 3).[25]

The well-established principle that unavailability of proof in a particular case, to sustain a burden resting upon a litigant, is "a misfortune to be borne by him" (*Burnet* v. *Houston*, 283 U. S. 223, 228), has been applied by this Court to sustain the validity of a presumption arising from possession in a criminal case:

> If the accused happens to be the only repository of the facts necessary to negative the

[25] The fact that neither in the *Delia* case nor in the *Tot* case did the jury believe the defendant's story is not an indication that a recidivist will never be believed. Each told an inherently improbable story of his acquisition of his gun, and as the jury observed the demeanor of each, it had cause for disbelieving each defendant entirely apart from their past records. The problem of rebuttal is discussed at greater length in Point II of the Government's brief in the *Tot* case, now pending as No. 569 in this Court.

> presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. * * * *Yee Hem* v. *United States*, 268 U. S. 178, 185.

The relative extent of the burdens resting on the prosecution and the defendant should be borne in mind in weighing the fairness of casting an affirmative burden on the defendant by means of the presumption. In the absence of the presumption, the prosecution doubtless without the assistance of testimony from the defendant would have to prove beyond a reasonable doubt that the defendant received gun and ammunition at the immediate termination of an interstate shipment. The defendant, however, need not establish his affirmative defense beyond a reasonable doubt or even by a preponderance of the evidence. He need only create a reasonable doubt that he is guilty as charged (*Davis* v. *United States*, 160 U. S. 469; *Matheson* v. *United States*, 227 U. S. 540), which means that unless the jury is satisfied beyond a reasonable doubt that his affirmative defense is false it must acquit him.[28]

We submit, therefore, that the defendant's readier knowledge of the facts and accessibility to proof justifies casting the burden on him by means of the presumption.

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[28] In the companion case, *Frank Tot* v. *United States*, No. 569, Tot contends that presumption places an even slighter burden on the defendant. The rule stated in the text hereinabove is that for which we argue in the *Tot* case.

Third: The state legislation and the expert evidence presented to Congress refer only to guns, not ammunition, and therefore the first test, discussed above, pp. 19–26, unlike the second test, does not support the presumption arising from possession of ammunition, involved under the second count of the indictment (R. 5). This presumption may, however, be rested on different considerations, which serve also as additional support for the presumption as to guns. This Court has pointed out that the two presumption tests just discussed do not exhaust the possibilities (*Morrison* v. *California*, 291 U. S. 82, 91):

> The decisive considerations are too variable, too much distinctions of degree, too dependent in the last analysis upon a common-sense estimate of fairness or of facilities for proof, to be crowded into a formula. * * *

Statutory presumptions had been regularly sustained by this Court against attack on due process grounds long before the rise even of the *Turnipseed* formula. *Turpin* v. *Lemon*, 187 U. S. 51, 59–60; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729; *Minn. & St. L. R. Co.* v. *Minnesota*, 193 U. S. 53, 63; *Williams* v. *Kirtland*, 13 Wall. 306, 310. The *Turnipseed* case itself, on its facts, amounts to nothing more startling than a familiar rule of *res ipsa loquitur*, a presumption of the railroad's negligence arising from proof of injury to a bystander by virtue of a derailment, for the

situation is normally under the railroad's control. This Court's settled practice of testing the validity of a statute by practical effect rather than language (*Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443; cf. *Harrison* v. *Northern Trust Co.*, decided January 11, 1943, No. 103, this term), applies in the presumption field. If the practical effect of the presumption, unrebutted, is to reach a result beyond legislative power, the presumption falls if it fails to meet the standard tests. *Bailey* v. *Alabama*, 219 U. S. 219, 244; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86–87. But if that result lies within direct reach of the legislative power, the presumption is sustained as reaching a permissible result, notwithstanding that it might not meet the *Turnipseed* or some other rule-of-thumb test. *Ferry* v. *Ramsey*, 277 U. S. 88.

In *Ferry* v. *Ramsey*, a statutory civil liability of a bank director for permitting the receipt of deposits after he acquires knowledge of insolvency of the bank was reinforced by a statutory presumption of his knowledge. Mr. Justice Holmes' prevailing opinion sustained the presumption, notwithstanding that it lacked sufficient probability to meet the "rational connection" test,[27] because

[27] Further, since knowledge itself was being presumed, the presumption could not be grounded on the "opportunities for knowledge" test of the *Yee Hem* and *Morrison*

the effect of the statute with the presumption was something less than the imposition of a liability on receipt after insolvency regardless of knowledge. As the legislature had the power to impose that absolute liability it also had the power, by arbitrary act of grace as it were, to exempt from that liability if the director could actually show he had no knowledge:

> The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it. 277 U. S. 88, 94.

Mr. Justice Sutherland's dissent frames the issue sharply, for it starts from the fact—which the prevailing opinion does not dispute—that there was only a negligible probative connection between fact presumed and fact proved, but insists on treating the statute precisely as written, as an unreasonable presumption statute rather than a reasonable though oddly drafted substantive statute carrying a limited exemption:

> I should have supposed the liability of the director must be measured by what the state has enacted and not by what it had the power to enact. 277 U. S. 88, 97.

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cases, for the basic assumption of the latter test is that the facts are within the knowledge of the person against whom the presumption operates.

Contra, dealing with an absolute presumption, *Heiner* v. *Donnan,* 285 U. S. 312, but see dissenting opinion of Mr. Justice Stone, 332, 335.[28]

From *Ferry* v. *Ramsey,* therefore, it follows in principle that if Congress had the intent and the power under the commerce clause to make it a substantive crime for men like defendant to possess guns or ammunition or to acquire them at all, its roundabout achievement of something less than that result, by imposing a presumption of receipt in interstate commerce springing from possession, is valid under the due process clause even if the inference of that particular sort of receipt be regarded as unfair or improbable. We submit that it had both that intent and that power.

The prohibitory purpose is demonstrated in the committee reports. The Special Committee on Crime expressed its fears of the constitutionality

[28] Cf. *Manley* v. *Georgia,* 279 U. S. 1, invalidating a statute imposing criminal liability upon bank officers in the event of fraudulent failure, and setting up a rebuttable presumption of fraud arising from the failure. *Ferry* v. *Ramsey* was not cited, notwithstanding the close similarity of the factual situation. The *Manley* case, however, does not argue an arbitrary restriction of the *Ferry* case to civil liability, but may be regarded as turning on the improbability that the legislature actually intended to impose a felony penalty for vicarious liability without fault, in view of its extreme harshness. Cf. Sayre, *Criminal Responsibility for the Acts of Another* (1930), 43 Harv. L. Rev. 689. In the instant case there can be no doubt that Congress intended to come as close to penalizing possession as its conception of its power under the commerce clause would let it.

of federal legislation phrased in the direct terms of making possession as such a substantive federal crime: "* * * it should be noted that in so far as 'possession' of weapons is referred to, it is a matter within the power of the states and not the Federal Government." But the Committee proposed through draftsmanship to achieve, as nearly as it thought constitutionally possible, the effect of operating on possession, for it recommended passage of the statute on the ground that its effect would be "to *take firearms from the possession* of the criminal and fugitive from justice;" and that it "is designed to prevent the crook and gangster, racketeer and fugitive from justice from being able to *purchase or in any way come in contact with* firearms of any kind or with *ammunition* for firearms." (S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 32–33, italics supplied.) In reporting the bill favorably both Senate committees, similarly, stated the hope that it "will eliminate the gun from the crooks' hands" (S. Rep. No. 997, 74th Cong., 1st Sess., p. 2; S. Rep. No. 82, 75th Cong., 1st Sess., p. 2).

The power to prohibit even intrastate possession or acquisition rests here on a well-founded congressional judgment of a probable dangerous interstate movement of the men themselves, "a reasonable fear upon the part of Congress" that the intrastate act of possession will "probably and more or less constantly" form part of a pattern

which has a deleterious interstate effect. *Stafford v. Wallace*, 258 U. S. 495, 521. This judgment of potential interstate crime on the part of ex-convict possessors of guns is in turn deeply rooted in the facts. The generally high correlation between gun possession and tendency to crimes of violence is well known from recidivism statistics.[29] More particularly as to interstate movement in crimes of violence involving guns, the hearings before the Special Committee dealt extensively with the problem of the roving gunman, his transit from state to state, his tendency to use one state as a base of operation for crimes committed in another, and the inability of the state of commission to cope with him; and the witnesses who brought these situations to the Committee's attention all recommended rigid federal firearms control.[30] This testimony on successful criminals is confirmed by statistics on unsuccessful criminals, showing that possessors of guns move from state to state far more readily

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[29] See e. g. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* (First Quarterly Bulletin 1935), table 20; (1940), table 100.

[30] Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2nd Sess. (S. Res. 74) pp. 220 (cf. 228), 261, 276 (cf. 281), 334, 337-338 (cf. 339-340). Summarizing, the committee reported: "One fact outstanding in all the hearings was that practically all witnesses testifying were of one mind—that some sort of Federal control of firearms is necessary." S. Rep. No. 1189, 75th Cong., 1st Sess., p. 32.

than the remainder even of the criminal population.[4]

Since the explicit overruling of *Hammer* v. *Dagenhart*, 247 U. S. 251, by *United States* v. *Darby*, 312 U. S. 100, 115, there is no longer any doubt that the multiform power of Congress to legislate on intrastate subject matter to the extent necessary or even desirable to effectuate control of an interstate traffic includes prohibition of intrastate acts deemed preparatory to probable interstate movement. See also *Thornton* v. *United States*, 271

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[4] Department of Commerce, Bureau of the Census, *The Prisoner's Antecedents* (1929), pp. 11–17, 54–58, covering federal and state commitments for the first six months of 1923. Since the period antedates that of the rise of notorious interstate gangsterism the correlations would probably be higher for later years. (1) On a mere residence basis the figures merely indicate the general criminal tendency to roam: 28.3% (4,226 out of 14,926) of the male offenders of all kinds tabulated were non-resident of the immediate locality of commission of the crime; while the inconclusively higher figure of 32.4% (36 out of 111) represented nonresidents convicted for carrying concealed weapons and other minor gun crimes. (2) But when the basis of comparison shifted to distinguish the men who had recently come from outside the state, the comparative figure for minor gun crimes ran much higher; while only 5.1% (848 out of 16,513) of all male offenders had been in the state less than one month at the time of the offense, 13.8% (16 out of 116)—between two and three times as high a proportion—of the gun offenders had been within the state less than a month. For *no other crime* comprised in the 5.1% average was the recent arrival figure as high as the 13.8 figure for gun crimes. (3) These results are paralleled, although from a much smaller sampling, by the comparison between recent arrival in county and in state, i. e.,

U. S. 414, 424; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601; *Wickard* v. *Filburn*, decided November 9, 1942, No. 59, this term.

A congressional prohibition of the possession of guns by people of demonstrated tendency to violent crime is thus a proper exercise of the commerce power not merely over the gun in past transit from Connecticut to Michigan but over the gunman in prospective transit from Michigan to some other state, based upon the judgment, supported by the record before the Special Committee and confirmed by the statistics, that it is probable that as a member of the gunman class he will so move. If gunmen operated in plain sight, from known addresses and with regular methods, some action short of the prohibitory presumption might be sufficient to control them in the interest of destination states. But the fugitive and clandestine nature of the traffic requires as it justifies the stringency of the control method from the viewpoint both of the commerce clause and of substantive due process. Cf. *Hess* v. *Pawloski*, 274 U. S. 352, and *Carroll* v. *United*

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transient gun carriers tend to come from without the state rather than merely from without the county, to a greater extent than other transient criminals; while of all the offenders who had been within the county less than a month 51.5% (868 out of 1685) had likewise been within the state for less than a month, this figure rises to 84.2% (16 out of 19) in the case of gun offenders who had been within both state and county less than a month, and here too the figure for gun crime is higher than that for any other crime in the total.

States, 267 U. S. 132, for a similar approach in related constitutional arenas. The propriety of special treatment to meet the special problems of firearms is well recognized in the law. See Inbau, *Firearms and Legal Doctrine* (1933) 7 Tulane L. Rev. 528. We submit that the presumption of section 2 (f) does not offend the due process clause, because it is something less than a flat prohibition of possession of guns and ammunition by ex-convicts, and a flat prohibition would be an appropriate preventative against movement of guns in commerce on the part of a class deemed by Congress particularly likely so to move them to the harm of the destination states. *Brooks* v. *United States*, 267 U. S. 432, 437.

B. THE PRESUMPTION OF TIME

The court below correctly construed the presumption of Section 2 (f) as going to the time as well as the manner of receipt,[*] but held it invalid

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[*] The statute as a whole is clearly intended to apply to guns already in existence. If not, the narrow exemption of section 4, for "antique . . firearms . . . possessed and held as curios or museum pieces," would be meaningless. Cf. *United States* v. *Scharton*, 285 U. S. 518. Additional technical warrant for the construction resides in the phrase "in violation of this Act," which appears in the presumption of both 2 (f) and 2 (i). Since a receipt before the effective date of the statute would not be a violation, the phrase itself imports a receipt subsequent. The absurd effect of a contrary construction is particularly striking under the obliteration clause, section 2 (i). If the serial number be removed from a gun of a standard model in production both

as unreasonable, particularly in view of the age of the gun in the case, upwards of twenty years old yet found on the respondent only a little more than three years after the effective date of the statute. It may be that if the presumption of receipt subsequent to the effective date must stand or fall in terms of naked probability as to date of acquisition, the presumption is indefensible as to guns in existence for a substantially longer period before than after the

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before and after the Act, it will ordinarily be impossible to determine its date of manufacture. The possessor of an obliterated gun could almost always assert without danger of contradiction that he acquired the gun before, whereupon the very act of obliteration which is a condition of the crime becomes a perfect defense to the crime, absent presumption, for the prosecution would be without proof.

The Jones-Miller Act, in the form in which it was sustained in *Yee Hem* v. *United States*, 268 U. S. 178, carried an explicit four-year time presumption. However, no inference is to be drawn that Congress' failure to use such language here indicates that it intended no time presumption, for that provision was not in the original Jones-Miller Act of February 9, 1909, 35 Stat. 614, but was added in the revision of January 17, 1914, to meet the special problem of fraudulently repackaging subsequently imported opium in containers stamped to show earlier importation. H. Rep. No. 24, 63rd Cong., 1st Sess. Indeed the time provision now appears in the Code in the simple and unspecific language, "contrary to law." 21 U. S. C. sec. 181.

See *White* v. *United States*, 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745, presuming time from possession under the parallel provisions of section 8 of the Harrison Act, 38 Stat. 789, Internal Revenue Code, Sec. 3224, under which unregistered possession is "presumptive evidence" of "a violation of this section." The same application of the

effective date. But as we pointed out in connection with the presumption of interstate acquisition, speculations of probability do not control.

First.—The presumption as to time of acquisition is supported by the second and third grounds upon which we supported the presumption of commerce, discussed above, pp. 26–38. We submit that for the reasons there stated the presumption as to time of acquisition is valid.

Second.—Even if the presumption of time of acquisition would be invalid standing alone, its validity is supported by its function as ancillary to the enforcement of the presumption of manner of acquisition. The ordinary impossibility of distinguishing between prior and subsequent acquisition except through evidence supplied by the acquiror, which we have already noted as a construction problem,[33] has constitutional operation as well. It leaves a gap in the effectiveness of the presumption of manner of acquisition which Congress had to fill to effectuate that presumption, and

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presumption is now made on the parallel problem of venue in purchase cases under the Harrison Act, *Casey* v. *United States*, 20 F. (2d) 752, 753–754 (C. C. A. 9), affirmed, 276 U. S. 413; *Killian* v. *United States*, 29 F. (2d) 455, 456 (App. D. C.); *Acuna* v. *United States*, 74 F. (2d) 359, 360, (C. C. A. 5); *Mullaney* v. *United States*, 82 F. (2d) 638, 641, (C. C. A. 9), although the older cases were to the contrary, *Brightman* v. *United States*, 7 F. (2d) 532 (C. C. A. 8); *Cain* v. *United States*, 12 F. (2d) 580 (C. C. A. 8); *Hood* v. *United States*, 14 F. (2d) 925 (C. C. A. 8); *De Moss* v. *United States*, 14 F. (2d) 1021 (C. C. A. 7).

[33] See footnote 32, supra.

Congress had the power to fill it by means which might not be otherwise valid. This conception of "the recognized need of drafting a workable statute," *United States* v. *Darby*, 312 U. S. 100, 118, has constant application to what Mr. Justice Holmes, dissenting, in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241, termed the "penumbra" of legislative power. In the *Darby* case it sustained as an exercise of the commerce power the record-keeping requirements of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. Sec. 201, as applied to records of goods which might never enter interstate commerce and transactions which were themselves entirely intrastate, on the ground that:

> Congress * * * may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. * * * 312 U. S. 100, 125.

Such supplementary sanctions, penalizing otherwise unreachable activity which causes confusion or otherwise hinders enforcement of legislation against acts clearly within legislative reach, are uniformly held valid. *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192, is probably the leading example. See also *Brolan* v. *United States*, 236 U. S. 216, sustaining section 2 of the Jones-Miller Act (35 Stat. 614, 21 U. S. C. Sec. 174), presuming unlawful concealment of imported opium from

possession, notwithstanding that the opium had come to rest within a state; *Silz* v. *Hesterberg*, 211 U. S. 31, sustaining a state statute forbidding possession of game during the closed season, as applied to game lawfully taken elsewhere and imported into the state; *McDermott* v. *Wisconsin*, 228 U. S. 115, sustaining the application of the old Pure Food and Drugs Act of 1906, 34 Stat. 768, to forbid the removal of federal labels and the substitution of state labels after the completion of the interstate journey; *United States* v. *Ury*, 106 F. (2d) 28 (C. C. A. 2), sustaining customs law provisions forbidding removal of origin marks from imported goods although the goods had come to rest in a state; *Selzman* v. *United States*, 268 U. S. 466, sustaining Prohibition regulations requiring the labelling of unpotable denatured alcohol as within the power of Congress over potable alcohol; *Nigro* v. *United States*, 276 U. S. 332, sustaining features of the Harrison Narcotics Act, a tax statute, applied to persons who were themselves under no liability for tax. So here, the requirement, that one who claims exemption as a prior transactor take affirmative steps to furnish adequate identification of the prior transaction, is proper to assure that no subsequent transaction will escape under the guise of being prior. The additional presumption is validly imposed "to obstruct the successful accomplishment of the main crime." *Nigro* v. *United States*, 276 U. S. 332, 344.

C. THE PRESUMPTION OPERATES NO MORE ONEROUSLY THAN WOULD THE PRESUMPTION OF CONSTITUTIONALITY IF THE STATUTE DIRECTLY PENALIZED POSSESSION

The attack on the validity of the presumption clause is based on the due process clause of the Fifth Amendment. Accordingly, the test to be applied in determining the validity of the presumption clause is whether its effect was to deprive defendant of a fair trial.[*] As the issue turns on the fairness of the effect of the presumption, the standards to be applied are abstract unless they be given recognizable form by comparison with some everyday practices of the law. And in making this comparison, it must be borne in mind that where this constitutional limitation is invoked, a statute is to be judged by its substance, not by its form (*Crowell* v. *Benson*, 285 U. S. 22, 53).

Here the presumption arose when the Government proved beyond a reasonable doubt that the defendant possessed a firearm and ammunition. The effect of the presumption at that point was to compel defendant to come forward, as in an affirmative defense, with evidence to show either (1) that he had not received the firearm and the ammunition in interstate commerce, or (2) that he had not received the firearm and ammunition subsequent to the enactment of the statute. Defendant came

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[*] *Lisenba* v. *California*, 314 U. S. 219, 236; *Snyder* v. *Massachusetts*, 291 U. S. 97, 107–108.

forward with evidence directed to the first of these points, evidence which the jury disbelieved.

The situation is comparable to that which would prevail if Congress should declare that possession of a firearm or of ammunition by an ex-convict shall be a federal offense. Proof beyond a reasonable doubt that a firearm was in the possession of an ex-convict would satisfy the Government's case. To avoid conviction, the defendant would have to show that the statute could not constitutionally apply to him.

This conclusion follows from repeated decisions of this Court, which were summarized by Mr. Justice Brandeis in *Heald* v. *District of Columbia*, 259 U. S. 114, 123, as follows:

> It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the

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The discussion above, pp. 34-38, shows that Congress has power to enact such a statute. However, for the purposes of this comparison, we assume (1) that Congress might not have power to prohibit possession resulting from an intrastate acquisition, and (2) that the basis exists for concluding that Congress wished the statute to be operative as to possessions resulting from interstate acquisitions even if it could not constitutionally apply to possessions resulting from intrastate acquisitions.

> statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held. * * *

This rule has been applied to defendants in federal criminal cases (*United States* v. *Miller*, 307 U. S. 174; *United States* v. *Carolene Products Co.*, 304 U. S. 144), in state criminal cases (*Hatch* v. *Reardon*, 204 U. S. 152; *Williams* v. *Walsh*, 222 U. S. 415; *Radice* v. *New York*, 264 U. S. 292), and in both civil and criminal cases where the defendant's claim of constitutional immunity was based on the commerce clause (*Hatch* v. *Reardon*, *supra*; *Williams* v. *Walsh*, *supra*; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642; *Detroit Bridge Co.* v. *Tax Board*, 287 U. S. 295).

Perhaps the closest parallel among the foregoing cases is *Williams* v. *Walsh*, *supra*, where a defendant was convicted of selling black powder in violation of a Kansas statute. In a habeas corpus proceeding testing the validity of his conviction, he contended that the statute was unconstitutional because it applied to interstate sales of powder as well as to intrastate sales. The court refused to consider that objection, because while the defendant had alleged that his powder had been sold in interstate commerce he had not proved it and therefore was not one to whom the statute could not constitutionally apply.[*] Thus the conclusion

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[*] There is no suggestion in this case or elsewhere that a different rule would have been applied had the de-

seems proper that where a defendant in a criminal case contends that he cannot be convicted because the statute involved is invalid under the commerce clause, he must show that his particular case is one to which the statute cannot constitutionally apply.[7]

The burden on such a defendant is well described by the language of Mr. Chief Justice Hughes in *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, where, speaking in terms of a presumption of constitutionality, he said that that presumption "is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. * * * one who assails [a statute] * * * must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the" statute is invalid. This

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fendant contested the validity of his conviction by an appeal instead of by writ of habeas corpus. The same rule has been applied where a constitutional objection was raised on appeal from a conviction. In *Radice* v. *New York*, 264 U. S. 292, the defendant actually introduced evidence as part of his case in an effort to sustain factually his contention of unconstitutionality. On appeal from conviction, this Court held he had not sustained his burden. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, and *United States* v. *Miller*, 307 U. S. 174, reversing the quashing of indictments where the Court held the defendant must show facts to establish that the statute is invalid as to him. The inference is that he must do it as part of his defense.

[7] This conclusion is equally supported by *Hatch* v. *Reardon*, *supra*, also a habeas corpus case raising the commerce clause as a bar to conviction.

burden was similarly described by Mr. Justice Stone in *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 283, where he spoke of "the burden which rests on him to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts." That this burden is not always easily met is shown by *Radice* v. *New York*, *supra*, a criminal case where the defendant actually introduced evidence to rebut "the presumption of facts supporting constitutionality," and his evidence was held insufficient.*

In the hypothetical case used for this comparison, the prosecution's case would not compel it to establish facts from which the defendant could argue that he acquired the objects in intrastate commerce. Defendant would have the burden of establishing facts to support such an argument. Likewise, in *Hatch* v. *Reardon*, *supra*, and *Williams* v. *Walsh*, *supra*, the prosecution's cases did not require them to establish facts from which it could be seen whether the defendants' acts had been in interstate commerce. In *Hatch* v. *Reardon* the prosecution showed merely that defendant had transferred title in New York to shares of stock without payment of the state stamp tax. The de-

* The evidence was offered to show that a state regulatory statute was arbitrary and unreasonable. Doubtless the burden of making such a showing is somewhat heavier than the burden of showing that one's acts were in interstate or intrastate commerce, as the case may be.

fendant was convicted because he failed to show facts to sustain his contention that the stock had been sold in interstate commerce. And the same situation prevailed in *Williams* v. *Walsh*, where the prosecution showed merely that defendant had delivered powder to someone in Kansas. Because defendant failed to bring forward evidence to sustain his allegation that the delivery was part of an interstate transaction, the conviction was upheld.

The foregoing discussion shows that the practical effect of the statutory presumption herein involved is the same as would be the practical effect of the presumption of constitutionality if the substantive provisions of the statute operated directly on possession. The showing required of the prosecution is the same in each case. The showing required of the defendant is the same in each case. In one case, these consequences flow from the statutory presumption. In the other case, they flow from the Constitution itself.[*]

Surely it cannot be that the statutory presumption has the effect of depriving defendant of a fair trial, of denying him due process, when it has precisely the same effect as the presumption of constitutionality would have if the substantive provisions of the statute directly penalized possession.

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[*] The discussion in the text has related expressly only to the presumption regarding interstate commerce. The presumption regarding the time of acquisition likewise has support in presumption of constitutionality cases. See *Stockholders* v. *Sterling*, 300 U. S. 175, 184.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below should be reversed.

CHARLES FAHY,
Solicitor General,
WENDELL BERGE,
Assistant Attorney General,
IRWIN L. LANGBEIN,
Special Assistant to the Attorney General,
VALENTINE BROOKES,
Attorney.

MARCH, 1943

APPENDIX

AN ACT

To regulate commerce in firearms

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(1) The term "person" includes an individual, partnership, association, or corporation.

(2) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

(3) The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.

(4) The term "manufacturer" means any person engaged in the manufacture or importation of firearms, or ammunition or cartridge cases, primers, bullets, or propellent powder for purposes

of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this Act.

(5) The term "dealer" means any person engaged in the business of selling firearms or ammunition or cartridge cases, primers, bullets, or propellent powder, at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach[1] mechanisms to firearms, and the term "licensed dealer" means any such person licensed under the provisions of this Act.

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

(7) The term "fugitive from justice" means any person who has fled from any State, Territory, the District of Columbia, or possession of the United States to avoid prosecution for a crime of violence or to avoid giving testimony in any criminal proceeding.

(8) The term "ammunition" shall include all pistol or revolver ammunition except .22-caliber rimfire ammunition.[2]

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[1] So in original.

[2] By act of August 6, 1939, 53 Stat. 1222, the definition of ammunition was changed to read: "(8) The term 'ammunition' shall include only pistol or revolver ammunition. It shall not include shotgun shells, metallic ammunition suitable for use only in rifles or any .22 caliber rimfire ammunition."

SEC. 2. (a) It shall be unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce.

(b) It shall be unlawful for any person to receive any firearm or ammunition transported or shipped in interstate or foreign commerce in violation of subdivision (a) of this section, knowing or having reasonable cause to believe such firearms or ammunition to have been transported or shipped in violation of subdivision (a) of this section.

(c) It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, unless such license is exhibited to such manufacturer or dealer by the prospective purchaser.

(d) It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment or has been convicted in any court of the United States, the several States, Territories, possessions (including the Philippine Islands), or the District of Columbia of a crime of violence or is a fugitive from justice.

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a

crime of violence or who is a fugitive [1] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive [1] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this act.

(g) It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen.

(h) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen, knowing, or having reasonable cause to believe the same to have been stolen.

(i) It shall be unlawful for any person to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been

[1] So in original.

removed, obliterated, or altered, and the possession of any such firearm shall be presumptive evidence that such firearm was transported, shipped, or received, as the case may be, by the possessor in violation of this Act.

SEC. 3. (a) Any manufacturer or dealer desiring a license to transport, ship, or receive firearms or ammunition in interstate or foreign commerce shall make application to the Secretary of the Treasury, who shall prescribe by rules and regulations the information to be contained in such application. The applicant shall, if a manufacturer, pay a fee of $25 per annum and, if a dealer, shall pay a fee of $1 per annum.

(b) Upon payment of the prescribed fee, the Secretary of the Treasury shall issue to such applicant a license which shall entitle the licensee to transport, ship, and receive firearms and ammunition in interstate and foreign commerce unless and until the license is suspended or revoked in accordance with the provisions of this Act: *Provided*, That no license shall be issued to any applicant within two years after the revocation of a previous license.

(c) Whenever any licensee is convicted of a violation of any of the provisions of this Act, it shall be the duty of the clerk of the court to notify the Secretary of the Treasury within forty-eight hours after such conviction and said Secretary shall revoke such license: *Provided*, That in the case of appeal from such conviction the licensee may furnish a bond in the amount of $1,000, and upon receipt of such bond acceptable to the Secretary of the Treasury he may permit

the licensee to continue business during the period of the appeal, or should the licensee refuse or neglect to furnish such bond, the Secretary of the Treasury shall suspend such license until he is notified by the clerk of the court of last appeal as to the final disposition of the case.

(d) Licensed dealers shall maintain such permanent records of importation, shipment, and other disposal of firearms and ammunition as the Secretary of the Treasury shall prescribe.

SEC. 4. The provisions of this Act shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for use of, (1) the United States or any department, independent establishment, or agency thereof; (2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision thereof; (3) any duly commissioned officer or agent of the United States, a State, Territory, or possession, or the District of Columbia, or any political subdivision thereof; (4) or to any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables; (5) or to any research laboratory designated by the Secretary of the Treasury: *Provided*, That such bank, public carriers, express, and armored-truck companies are granted exemption by the Secretary of the Treasury; nor to the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces: *Provided*, That noth-

ing herein contained shall be construed to prevent shipments of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully delivered by the Secretary of War, nor to prevent the transportation of such firearms and ammunition so delivered by their lawful possessors while they are engaged in military training or in competitions.

SEC. 5. Any person violating any of the provisions of this Act or any rules and regulations promulgated hereunder, or who makes any statement in applying for the license or exemption provided for in this Act, knowing such statement to be false, shall, upon conviction thereof, be fined not more than $2,000, or imprisoned for not more than five years, or both.

SEC. 6. This Act shall take effect thirty days after its enactment.

SEC. 7. The Secretary of the Treasury may prescribe such rules and regulations as he deems necessary to carry out the provisions of this Act.

SEC. 8. Should any section or subsection of this Act be declared unconstitutional, the remaining portion of the Act shall remain in full force and effect.

SEC. 9. This Act may be cited as the Federal Firearms Act.